FILE COPY

Office - Supreme Court, U. S.
MAR 7 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,
Appellant,

VS.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing.

R. M. RIESER,
Madison, Wis.,

HERBERT H. NAUJOKS,
BARNABAS F. SEARS,
1 North LaSalle,
Chicago 2, Illinois,
Counsel for Appellant,
State Farm Mutual Automobile Insurance Company.

EKERN, MEYERS AND MATTHIAS,
Of Counsel.

INDEX.

	PAGE
I. Due Process	2
II. Full Faith and Credit	11
III. Commerce	14
IV. Conclusion	18

List of Authorities.

A. *Cases*

Angers v. Sabatinelli, 235 Wis. 422, 239 Wis. 364 15

American Tel. & Tel. Co. v. U. S., 299 U. S. 232 11

Duel v. State Farm Mutual Automobile Ins. Co., 240 Wis. 161 ..... 4, 8

Hartford A. & I. Co. v. Delta & Pine Land Co., 292 U. S. 143 10

Hoopeston Canning Co. v. Cullen, 318 U. S. 313 ..... 6, 7

Mutual Life Ins. Co. v. Liebing, 259 U. S. 209 14

Northwest Airlines Inc. v. Minnesota, 88 L. Ed. 956 ..... 2, 11

Osborn v. Ozlin, 310 U. S. 53 6

State Farm Mutual Automobile Ins. Co. v. Duel, 244 Wis. 429 2

B. *Text Books*

Roscoe Pound, "The Spirit of the Common Law," pp. 166, 167 5

C. *Statutes*

1. Wisconsin Statutes, 1943:

Sec. 201.03 ..... 6, 7

Sec. 201.18 ..... 2, 3

Sec. 201.32 6

Sec. 204.27 ..... 6, 7

Sec. 204.28 ..... 6, 7

Sec. 274.33 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 115

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AN ILLINOIS CORPORATION,

Appellant,

VS.

MORVIN DUEL, COMMISSIONER OF INSURANCE OF THE STATE OF WISCONSIN,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

With all deference, we respectfully submit that this Court has seriously misapprehended and failed to give proper consideration to the facts of this case. The general legal principles enunciated in the opinion on page 3 are

unassailable; we have never argued to the contrary. The point is that the Court has failed to apply those "settled legal principles to the precise circumstances of this case". (*Northwest Airlines Inc.* v. *Minnesota*, 88 L. Ed. 956, 957).

I.

DUE PROCESS.

This Court says that the Wisconsin Court held that the statute in question (201.18 Wis. Stats.; Orig. Br. 11) "required a reserve which covered the over-all liability of appellant" (Op. p. 2) when the plain fact is that the Wisconsin Court held no such thing. This statement is advisedly made and would not be made if there were any room for difference in construction. If there were room for such difference, we would assume this Court's construction.

So that there can be no question as to what the Wisconsin Court held, here is the language of that Court verbatim (R. 137, 138, 139) (*State Farm Mutual Automobile Ins. Co.* v. *Duel*, 244 Wis. 429):

> "Recurring to the ground of the commissioner's refusal of a license first above stated, the commissioner contends that the reserve required by sec. 201.18 (1) is to cover the overall liability of the company and that it was so decided in the former case. The company contends that this reserve is not to cover the company's overall liability, but only its liability to return to its policyholders their unearned premiums in case of cancellation of their policies; and that as in other states the membership fees are not subject to return as unearned premiums in case of cancellations in those states, there is no need or occasion to include fifty per cent of these fees in the reserve set up to secure return of unearned premiums, and that the company has fully met the purpose of the statute by setting up as an unearned premium reserve for

Wisconsin members fifty per cent of the premiums paid by them and fifty per cent of the premiums paid in other states as those states construe premiums.

"We unquestionably decided in the former case that membership fees exacted by the company from its policyholders are a part of the premiums paid by them, and that before the company could have a license to do business in this state it had to set aside a reserve comprising fifty per cent of what it designated as premiums and fifty per cent of the membership fees, in order to meet the requirement of sec. 201.18 (1) That statute is here set out in the margin. The company refuses to do this and seeks to justify its refusal by not exacting the membership fee from its Wisconsin policyholders but to exact from them an increase of the premiums paid by them by an amount equivalent to the membership fees exacted from policyholders in other states. Manifestly this does not meet the requirements of the statute. The statute specifically designates the amount of this reserve. *It requires the designated amount to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities.* No matter by how much the assets of the company exceed these liabilities, unless the amount designated by the statute is set up as the reserve required by the statute, it can not have a license to do business in this state and it can not do business in this state without a license authorizing it to do it. The statute is so written and it has been declared valid, and as it is written it must be executed. We are not concerned with the wisdom of the statute, *nor with the probability of the company's meeting the obligation to refund unearned premiums* out of its surplus or its contingent reserve or its other assets. *We are only concerned with the carrying out of the legislative intent evidenced by it.* Nor are we attempting to interfere with the manner in which the company shall do its business in other states or with the manner in which the company's contracts shall be construed in other states. The company seems to think that its constitutional rights are in some way interfered with

by the commissioner's refusal to issue it a license. We are unable to perceive that any such question is involved in view of the fact that the company is only required to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do.

"*We think this is all that need be said to support an affirmance of the judgment.* If anything else is necessary to an understanding of this decision it may be found in the opinion of the former case." (Emphasis supplied.)

Again with all deference, it is perfectly evident that the Wisconsin Court ignored the presence or absence of a legitimate Wisconsin interest. It wasn't concerned with "the wisdom of the statute" (R. 139). It wasn't concerned "with the probability of the Company's meeting the obligation to refund unearned premiums" (R. 139). It specifically ignored the Commissioner's argument that the reserve required "is to cover the overall liability of the company and that it was so decided in the former case" (R. 137). It, we submit, negated this argument when it said that the reserve had "to be maintained wholly independent of the company's solvency in the sense that its assets equal its overall liabilities" (R. 138).

And when consideration is focused upon its former opinion construing this same statute that it was

"impossible to repel the implication from all this that the amount exacted to cover the cost of insurance shall buy insurance protection which may be so measured *that the unearned portion of the premium deposit may be ascertained and returned*" (*Duel v. State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161, 178; Reply Br. 4; Emphasis supplied)

with the presence of *other Wisconsin statutes specifically designed* to secure the solvency and the ability to satisfy overall liability of appellant (Orig. Br. 16, 38; Reply

Br. 2, 23), ignored in the present opinion, it becomes clearly evident that the Wisconsin court, unable to find any interest to be served by the creation of a reserve to secure a non-existent liability, was forced to concern itself only with "the carrying out of the legislative intent evidenced by" the Statute (R. 139). It was "so written and it has been declared valid and as written it must be executed" (R. 138). It was constitutional because "the company is required only to do what every other corporation, whether domestic or foreign, and every other person or association that wants to do a like insurance business in Wisconsin is required to do" (R. 139).

Now for a Court to say, in view of the foregoing and the record, that the Wisconsin Court held that this statute "required a reserve which covered the overall liability of appellant" reminds us of the rescue of Jim by Tom Sawyer as related by Dean Pound in The Spirit of the Common Law on pp. 166, 167:

> "When Tom Sawyer and Huck Finn had determined to rescue Jim by digging under the cabin where he was confined, it seemed to the uninformed lay mind of Huck Finn that some old picks the boys had found were the proper implements to use. But Tom knew better. From reading he knew what was the right course in such cases, and he called for case-knives. 'It doesn't make no difference,' said Tom, 'how foolish it is, it's the *right* way and it's the regular way. And there ain't no other way that I ever heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife.' So in deference to the books and to the proprieties the boys set to work with case-knives. But after they had dug till nearly midnight and they were tired and their hands were blistered and they had made little progress, a light came to Tom's legal mind. He dropped his knife, and, turning to Huck, said firmly, 'Gimme a case-knife.' Let Huck tell the rest:
>
> "'He had his own by him, but I handed him mine. He flung it down and says, "Gimme a *case-knife.*"

> "'I didn't know just what to do—but then I thought. I scratched around amongst the old tools and got a pickax and give it to him, and he took it and went to work and never said a word.
>
> "'He was always just that particular. Full of principle.'"

There is, of course, no escape from the soundness of this Court's language that "Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens" (Op. p. 3). Its relevancy to a case not decided upon a solvency premise and where the financial soundness of the company was well established (Orig. Br. 8, 9, 16, 32) and undisputed (Orig. Br. 16) is not readily apparent. This Court has distinguished itself by its rigid adherence to the precise facts of the case in considering constitutional problems. We fail to understand why there was omitted from the opinion any reference to undisputed facts relative to appellant's solvency and its admitted conformance to the general solvency statutes of Wisconsin (Wis. Stats. 201.03; 201.32; 204.27; 204.28), statutes designed to secure overall solvency and to guarantee "financial soundness of companies writing insurance contracts" with the citizens of Wisconsin (Orig. Br. 16, 32, 58; Reply Br. 2, 23-27).

In this case, the authoritativeness of *Osborn* v. *Ozlin*, 310 U. S. 53 and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, is likewise not readily apparent. Hoopeston recognized specifically that the question was whether the legislation so affected New York interests as to give it "the power it claims" (Orig. Br. 36, 37, 38). Osborn pointed out carefully that what Virginia had done was "very different from the imposition of conditions upon appellant's privilege of engaging in local business which would bring within the orbit of state powers matters unrelated to any local interests" (p. 65; Orig. Br. 38). Hoopeston dealt with "stipulated operating reserves for

payment of losses, for a contingent liability of subscribers of not less than one nor more than ten times the amount of annual premium expressed in the contract and for a surplus to be maintained unimpaired'' (*Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 320).

We conform to the similar Wisconsin statute relative to ''operating reserves for payment of losses'' (Wis. Stats. 204.27, 204.28; Reply Br. 23). The reserve to secure the contingent liability of subscribers is not material here because we are not a reciprocal but a non-assessable mutual. We conform to the similar Wisconsin statute relative to ''a surplus to be maintained unimpaired'' (Wis. Stats. 201.03; Orig. Br. 58). In fact our surplus is more than two hundred times that required by the Wisconsin statute (Reply Br. 2, 3). Hoopeston didn't seek to create a reserve for a liability nonexistent, much less did it try to do so on business transacted without its borders. The plain fact is that we have never argued against the ''principles announced'' in Hoopeston and Osborn.

Those principles were carefully noted and adequately stated in Hoopeston thus: ''* * * The issue remains whether the insurance enterprise as a whole so affects New York interests as to give New York the power it claims''. Conceded there may be a ''measuring rod of financial stability or strength'', this ''rod'' must, nevertheless, measure ''liability'' (contingent or actual). When this Court said in the instant case ''any financial statement requested by Wisconsin or any other state would need reflect all assets and liabilities of the company in the interest of truth'', the characteristics of the ''measuring rod'' were thereby defined. ''Assets and liabilities'' are exact terms whether ''accounting is an exact science'' or not. These items are identified and defined by the contract where made and the laws under which enforced. To ignore the effect of a contract as applied in another state and to insist that what is not a liability in 36 states

may, nevertheless, be treated as a liability in Wisconsin neither "measures solvency" nor reflects "assets and liabilities" in the "interest of truth". As applied in this case the "rod" is a "rod in pickle" and not a "measuring rod".

Because this is a result of the Court's decision, the cases relied on and the principles quoted therefrom have been incorrectly applied. In the cases cited "local interest" was present and the means to protect it was appropriate. Here the local interest extends only to obtain a *correct* report or statement of "assets and liabilities" as defined by the contract and the laws of the other states. Instead the State of Wisconsin requires the company to state under oath as the truth what is, in fact, untrue. An untruth can measure neither financial "soundness" nor "future contingent liability".

There can be no escape from the premise that the Wisconsin requirement requires us to falsify our assets and liabilities (Reply Br. 19; Orig. Br. 31) and this with reference to business transacted entirely without its borders (Orig. Br. 31). *This statute by its terms is an unearned premium or reinsurance reserve statute. It is nothing else by its terms.* As twice construed by the Wisconsin Supreme Court its purpose was to insure *"that the unearned portion of the premium deposit may be ascertained and returned"* (*Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161, 178, Reply Br. 4; emphasis supplied). That Court never construed the statute in any other light. It was unconcerned "with the probability of the company's meeting its obligation to refund unearned premiums" (R. 139) in the instant case. Here is the second time where that Court indicates its conception of that statute. It was constitutional because of its equal operation upon all. Wisconsin had the right constitutionally to impose a requirement which had nothing to do with actual liability if it operated upon all alike, is the sole *rationale* of the Court.

From the technical insurance reserve standpoint, the Wisconsin court understood the problem. This Court didn't follow the Wisconsin court's opinion. Insurancewise, the Wisconsin court knew that this statute was designed primarily to secure the liability to refund unearned premiums, that a reserve which satisfied that liability was amply sufficient to satisfy that statute, that the reserve was one reserve and that reinsurance presented no problem (Reply Br. 5, 6). It was for this reason that it held the statute constitutional because of its equal operation upon all.

Insurancewise, the Attorney General of Wisconsin understands the problem. It was for this reason, in view of the Wisconsin Court's construction, that he argued that the reserve "is merely a bookkeeping entry, there is no segregation or trust-funding of assets for this reserve liability" (Opp. Br. 16) ignoring his own authorities to the contrary (Reply Br. 11, 12). It was for this reason that he was compelled to argue for a broader construction of the statute than that placed upon it by the Wisconsin Court (Opp. Br. 13, *et seq.*) to sustain it. Has he one place in his brief quoted any reference to either of the Wisconsin opinions to sustain any of his theories as to the meaning and purpose of this statute? He has not! He quotes from text writers (Opp. Br. 15, 16) ignoring our text authority (Orig. Br. 23) with whom the Wisconsin Court agreed (Reply Br. 4).

Now then, the purpose of the statute being to insure "that the unearned portion of the premium deposit may be ascertained and returned", obviously means returned to the policyholder. It is satisfied therefore by a reserve which secures that purpose and discharges that liability. Wisconsin doesn't and couldn't argue that the liability of the company to return unearned premiums must be fixed by the law of Wisconsin regardless of where the business was conducted (Orig. Br. 31, *et seq.*) and this

Court says that "any financial statement required by Wisconsin or any other state would need reflect all assets and liabilities of the company in the interests of truth", but the fact remains that required is a financial statement which does not in law or fact reflect those assets and liabilities truthfully (Orig. Br. 31-38; Reply Br. 19).

It is certainly obvious that the liability to return "the unearned portion of the premium deposit", being the sole purpose of the statute as we are advised by the Wisconsin Court, is required to be falsely stated. Notwithstanding no liability to return any part of membership fees in those states which recognize them as no part of the premium, the Wisconsin requirement compels us to set aside 50% of those moneys as a reserve in trust and show on our books a liability to return a part of such money as an "unearned portion of the premium deposit" when no such liability exists. Before the Wisconsin requirement can "reflect all assets and liabilities of the company in the interests of truth" these non-Wisconsin transactions must create a liability in fact and in law enforceable in Wisconsin.

Would anyone contend that Wisconsin had the right to make that a liability which was not one by the law of the state where the transaction occurred? Let us assume a policy is issued in Illinois to an Illinois resident. He pays a $10.00 membership fee and a $50.00 premium. He cancels the policy the next day. He sues in Wisconsin to recover the unearned portion of the premium deposit. Could a Wisconsin court say that the premium deposit was $60.00 when Illinois law says that it is $50.00? Obviously not (*Hartford A & I Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 149, and cases cited; Orig. Br. 35, *et seq.*) yet the Wisconsin requirement compels us to reflect upon our books a liability based upon a premium deposit of $60.00 on this identical transaction. Thereby we are re-

quired to base a contingent liability on a sum of $60.00 when our actual legal contingent liability is based upon a sum of $50.00.

It is obvious that the financial statement required of us by Wisconsin does not "reflect all the assets and liabilities of the company in the interests of truth". Thereby we are between Scylla and Charybdis. By conforming to the Wisconsin requirement, we cannot conform to this Court's opinion that "any financial statement required of us by Wisconsin or any other state would need reflect all assets and liabilities of the company in the interests of truth". The precise point is that Wisconsin is hereby regulating our "out of state activities through such a requirement", posing "different questions". Factually at bar, the precise point is that Wisconsin requires a false financial statement, a requirement proscribed by due process (Reply Br. 18, 19). Recognizing the rule (Op. p. 4; *American Tel. & Tel. Co.* v. *U. S.*, 299 U. S. 232, 240; Reply Br. 19) this Court fails to apply it because of its misconception of the facts.

Where is there here any benefit to a Wisconsin citizen? This Court points out none. Neither did the Wisconsin Court. We argued this point factually at considerable length (Orig. Br. 22, 23, 38; Reply Br. 18, 19) and certainly it is not answered by generalities which disengage themselves from "the precise circumstances of this case" (*Northwest Airlines, Inc.* v. *Minnesota*, 88 L. Ed. 956, 957).

II.

FULL FAITH AND CREDIT.

Inherent in the Court's conclusion under this heading is the false premise that because "Illinois * * * does not treat membership fees as a part of the premiums" ap-

pellant claims "that Wisconsin may not do so". We do not and never did argue that Illinois could fix financial standards for Wisconsin or determine the incidents of contracts written in Wisconsin. We do not and never did argue that if Wisconsin had a superior interest full faith and credit required her to apply foreign law regardless of such interest (Orig. Br. 42, 43). We did argue, and we think it is clear, that in order for Wisconsin to exercise the power she claims, it must affirmatively appear, that what is done under foreign law in a foreign state has an ascertainable impact in Wisconsin or upon her citizens. Until then, there can be no "conflicting *interests*" to be accommodated and the positive rule of full faith and credit must therefore be applied. It never has been held that one state may "override the laws and policy of another" and thereby transform a transaction vesting absolute title in funds collected in another state into one involving continuing liability. To permit Wisconsin to require a foreign company to reflect untruthful and unreal transactions upon its books as a condition for admission to Wisconsin can furnish no "appropriate means of protecting its (Wisconsin's) own citizens" because it has no relationship to any interest that Wisconsin may have. These considerations have been ignored in the opinion of the Court.

What Wisconsin interest was identified in the opinion of the Wisconsin Court? The case boils down to the question of whether this Court is going to follow the construction the Wisconsin Court placed upon its Statute or that of the Attorney General. While this Court speaks loosely of "Wisconsin's prerogative to select the appropriate means of protecting its own citizens by establishing financial standards for companies which exploit the opportunities which Wisconsin affords", this Court, like the Wisconsin Court, is silent as to the specific manner in

which, under "the precise circumstances of this case", those citizens are protected.

Are they protected by the creation of a reserve to secure a non-existent liability, by a reserve which freezes free assets of the company (Orig. Br. 22, 23)? Are they protected by the creation of a reserve from monies collected elsewhere to be held in trust for the benefit of those from whom it is collected? Certainly the Wisconsin Court knew whether there was present or absent a legitimate state interest and it spoke of none. The point is that these questions are unanswerable and therefore the Statute was constitutional because of its equal operation upon all and not because the interests of Wisconsin were superior to those of the foreign state. How could appellant show in this case that "of the conflicting interests involved those of the foreign state are superior to those of the forum," when the forum didn't decide the case on a question of interest, notwithstanding the point being urged upon it. And when full faith and credit is interposed, is it full faith and credit for this Court to construe the Statute differently than did the State Court, to construe the Statute as if it were construed by the State Court on the issue of state interest and say that a private litigant had failed to carry a burden which the State Court didn't construe as constitutionally pertinent. It is for Wisconsin to state the interest of Wisconsin, if in fact one appears, and not for this Court to state the interest of Wisconsin. It is for this Court to accept the construction of the State Court.

There is no escape from this premise insofar as the record in this case is concerned. Is it Wisconsin's constitutional prerogative to create a reserve to secure a liability that doesn't exist as to occurrences beyond its borders merely because it operates equally on all companies doing business in Wisconsin? That is the precise

constitutional point presented to this Court, not only from the standpoint of full faith and credit, but also from the standpoint of due process.

If the full faith and credit clause doesn't preclude such conduct then it is idle to talk of it as a "nationally unifying force". Without interest or reason is Wisconsin to be permitted to ignore "The Constitution" and "first principles of legal thinking" which "allow the law of the place where the contract is made to determine the validity and consequences of the act" (Holmes, J., in *Mutual Life Ins. Co.* v. *Liebing*, 259 U. S. 209, 214; Orig. Br. 42; Reply Br. 20).

III.

COMMERCE.

The suggestions hereinafter are for consideration only in the event this petition be denied as to the due process and full faith and credit issues. In which event, we respectfully submit that the opinion of the Court and the mandate to follow should be revised so as to vacate the judgment with directions for further proceedings on the commerce question in order to fully protect appellant's rights.

The opinion recognizes that we are entitled to a hearing upon the commerce point and that "customary procedure has been for the court to vacate the judgment of the state court where there has been a supervening event * * * and to remand the case so that the court from which it came might consider the question in the light of the changed circumstances". This procedure the Court "would not hesitate to adopt * * * in the interests of justice if it appeared that otherwise appellant would be foreclosed from an adjudication of the issue". That customary procedure

is not followed because we have not shown that we would be otherwise prejudiced and because this Court is of opinion that we cannot be.

With all deference to this Court, there is some probability that very serious and prejudicial action might conceivably ensue. We assumed in our original brief that customary procedure would be followed (Orig. Br. 12, 43). Therefore, we did not mention the fact that one of the terms and conditions imposed by the Wisconsin Court upon this appeal was a requirement that appellant post a penal bond in the sum of $50,000.00,

> "conditioned that if the State Farm Mutual Automobile Insurance Company, an Illinois corporation, shall pay all penalties and fines which may be imposed under Section 348.488, Wisconsin Statutes, and shall not later than the first day of September, 1944, file with the Clerk of the Supreme Court of Wisconsin, to be held by said Clerk subject to the further order and disposition by this Court, a list of policies written or renewed by defendant in this state during the period between May 1, 1942, and April 30, 1944, and showing as to each policy the name of the person to whom such policy was issued, the date thereof and the amount of premium received therefor, then the said bond shall become void.
>
> "Said bond having been filed with the petition herein and being in due form and in proper amount, is accordingly approved." (R. 5)

Let us consider the fact that Mr. Justice Jackson expressed "doubt that the Wisconsin Supreme Court can open and re-examine a judgment after it is affirmed by this court". This Court cites *Angers* v. *Sabatinelli*, 235 Wis. 422, id. 239 Wis. 364, to support the statement that the power to allow an amendment "exists after the case has been remanded to the trial court following an affirmance by the Wisconsin Supreme Court". That case went up on demurrer, a special statute of Wisconsin allowing

an appeal from such an interlocutory order (Wis. Stats. 274.33). No final judgment had ever been entered in that case. That case doesn't hold that upon the affirmance of a final judgment by the Wisconsin Supreme Court or this Court, that the parties under Wisconsin law may replead upon the filing of a mandate which affirms a final judgment and no Wisconsin case so holds, as far as we have been able to find. Its authority as a precedent is obviously limited to its facts and anything the Court there said is likewise limited to those facts.

To properly present the issue we have to get this case back to the Dane County Circuit Court from which it originated. That Court can only follow the mandate of the Wisconsin Supreme Court. The way it stands now, we probably have to present to the Wisconsin Supreme Court a motion to frame its mandate to the Circuit Court of Dane County. Probably with that motion, we would have to present proposed and suggested amendments to the pleadings. The matter being without precedent, we really don't know what correct procedure dictates. We know of no source from which we can determine such procedure. What substantial reason can there be in requiring these unusual and unprecedented steps when the rights and interests of all parties can best be protected by following customary procedure in this case?

Appellant can obtain no authoritative adjudication from the Wisconsin Court until after the mandate of this Court reaches that Court and its motion or other required pleading is presented to that Court. If the Wisconsin Court took the view that it could not re-examine an affirmed judgment, then appellant is in serious difficulty. Action could be brought upon the bond to collect the fines and penalties which appellee contends should be imposed and for which the bond is given. These fines and penalties would be for conducting business in Wisconsin illegally

for the period in question. The attendant loss of good will resulting therefrom is obvious. The condition of the bond being absolute, recovery might be had thereon even though it ultimately be determined that the commerce clause precluded the Wisconsin requirement. All of this could happen regardless of whether the Wisconsin Supreme Court was right or wrong on this question and appellant would be left to the dubious remedy of a mandamus from this Court to compel the Wisconsin Court to follow the spirit and letter of this Court's opinion and mandate.

It is obviously the intent of this Court to preserve the *status quo* until all questions which appellant has a constitutional right to urge are decided. The only reason moving this Court to refuse to vacate this judgment was because it "did not think it was necessary". Because of the foregoing considerations, we submit that it is necessary to follow customary procedure. Furthermore, the record in the 1944 proceeding is not and never has been before this Court. It was merely mentioned by the appellee in his brief (p. 20). Because it was *dehors* the record, we ignored the statement in reply and didn't point out that the issues in that case are not precisely the same as the issues in this case. That case does not afford us the remedy or freedom from prejudice afforded by this case in presenting the commerce issue.

Furthermore, we are reasonably apprehensive that the Wisconsin Court might take a view at variance with that of this Court relative to its power to permit a repleading upon an affirmance of its judgment by this Court. Only by a vacation of the judgment can appellant's rights be secured from prejudice without question. If it is the ruling of this Court that appellant be denied a rehearing on due process and full faith and credit, it can be so stated in this Court's opinion and the opinion and man-

date can read, "affirmed as to due process and full faith and credit and vacated and remanded for further proceedings not inconsistent with this opinion". In this way, customary procedure is followed, removing all doubt of the probability or possibility of prejudice to appellant until all of the questions which appellant has a constitutional right to raise are determined in this proceeding.

IV.

CONCLUSION.

For the reasons above stated, appellant respectfully submits that a rehearing be granted. Should the Court decide to adhere to its opinion on the constitutional questions relating to due process and full faith and credit, appellant respectfully suggests that to protect appellant on the commerce question the opinion and mandate should be modified as follows: "Affirmed as to due process and full faith and credit, and vacated and remanded for further proceedings not inconsistent with this opinion."

Respectfully submitted,

R. M. Rieser,
Madison, Wisconsin,

Herbert H. Naujoks,
Barnabas F. Sears,
1 No. LaSalle Street,
Chicago 2, Illinois,
Counsel for Appellant.

CERTIFICATE.

I, Barnabas F. Sears, one of the attorneys for appellant, hereby certify that the foregoing petition for rehearing is filed in good faith and not for purposes of delay.

BARNABAS F. SEARS.

March 7, 1945.

SUPREME COURT OF THE UNITED STATES.

No. 115.—October Term, 1944.

State Farm Mutual Automobile Insurance Company, an Illinois Corporation, Appellant, *vs.* Morvin Duel, Commissioner of Insurance of the State of Wisconsin.	Appeal from the Supreme Court of the State of Wisconsin.

[February 12, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a) from the judgment of the Wisconsin Supreme Court which sustained the constitutionality as construed and applied to appellant of § 201.18 of the Wisconsin Statutes, 1943. 244 Wis. 429.

Sec. 201.18 reads as follows:

> "Reserves, basis for. (1) The unearned premium or reinsurance reserve for every insurance company when no other statutory provision is made therefor, shall be computed by the commissioner by setting up fifty per cent of the premiums received on all risks that have one year or less to run, and pro rata of all premiums on risks that have more than one year to run. In the case of perpetual risks or policies, the whole amount of premium paid shall be set up as a reserve. Every such company shall show its reserve, computed upon this basis, as a liability in the annual statement required by section 201.50.
>
> "(2) Where no other provision is made therefor by law, the reserves of any insurance company shall be calculated upon such basis, method and plan as shall fully provide for all liabilities, and any basis, method and plan fixed by the order of the commissioner shall be prima facie just, reasonable and proper."

The insurance commissioner of Wisconsin refused appellant a license in 1942 and also in 1943 for failure to comply with that provision. Appellant accordingly brought suits to enjoin the commissioner from interfering with its business and to require him to issue it a license to do business in the State for the years in question. The facts may be briefly stated.

Appellant is an Illinois corporation doing business in many States. It started doing business in Wisconsin in 1939. It writes various forms of automobile insurance on the mutual plan. When it writes a policy for a new customer, it charges him a membership fee in addition to a premium. The membership fee is not returnable but entitles the insured to insure one automobile so long as he remains a desirable risk and so long as the company continues to write such coverage. It is said that the membership fee gives a life option to the insured to purchase insurance at a saving of from twenty to thirty-five per cent of the usual cost. Appellant has contended that the membership fees are no part of the premiums, furnish no insurance protection, and merely reimburse it for the expense of obtaining the new business. Wisconsin took a different view. The commissioner refused renewal of appellant's license for the years ending May 1, 1940, and May 1, 1941. Litigation followed which resulted in the decision of *Duel* v. *State Farm Mutual Automobile Ins. Co.*, 240 Wis. 161. The Wisconsin Supreme Court held as a matter of law that the membership fees were part of appellant's premiums and that 50 per cent of them must be included in the reserve required by § 201.18. Thereupon appellant adopted and submitted to the commissioner a new scheme for doing business in Wisconsin. The plan was to abandon the membership fee in Wisconsin, to require none of its Wisconsin policyholders, and to do business in Wisconsin on a level premium basis. The result was that the premiums required to be paid in Wisconsin were 27 per cent higher than those required in States which construed premiums as not including membership fees. The commissioner refused to grant appellant the licenses for these later years because its reserve required by § 201.18 did not include 50 per cent of the membership fees obtained on business written in other States. The present litigation ensued. The Wisconsin Supreme Court sustained the commissioner, holding (1) that § 201.18 required a reserve which covered the over-all liability of the appellant and (2) that § 201.18 as construed and applied did not contravene appellant's constitutional rights.

Of the three constitutional questions argued here two were raised below. They are that the statute violates (1) the due process clause of the Fourteenth Amendment and (2) the full faith and credit provision of Art. IV, Sec. 1. We think neither of the two has merit.

I. So far as due process of law is concerned, this case is governed by the principles announced in *Osborn* v. *Ozlin*, 310 U. S. 53, and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313. In *Osborn* v. *Ozlin*, *supra*, p. 62, we stated that "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." We sustained in that case Virginia legislation which forbade a licensed company to write insurance in Virginia except through a resident agent and which provided that the resident agent could not retain less than one-half of the customary commission even though the business originated with an out-of-state broker, the resident agent rendering only a perfunctory service. We held that by such measures Virginia was seeking to protect the interests of her citizens, not to prohibit the making of contracts beyond her borders. In *Hoopeston Canning Co.* v. *Cullen*, *supra*, we sustained provisions of the New York Insurance Law as applied to reciprocal insurance associations licensed to do business in New York but with headquarters in Illinois. The regulations which New York had imposed included stipulated operating reserves for payment of losses, a contingent liability of subscribers of not less than one nor more than ten times the amount of the annual premium expressed in the contract, and a requirement for the maintenance of an unimpaired surplus. We said, "Neither New York nor Illinois loses the power to protect the interests of its citizens because these associations carry on activities in both places. . . . We think the regulations themselves, since they are aimed at the protection of the solvency of the reciprocals or at promoting the convenience with which New York residents may do their insurance business, are all within the scope of state power." 318 U. S. p. 321.

Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens. The reserve which it requires under § 201.18 is designed to measure the entire future contingent liability on unexpired risks. That contingent liability is obviously relevant in any appraisal of the financial soundness and stability of the company. It is to be sure a bookkeeping requirement. But it is more than that: It is one of Wisconsin's measuring rods of financial stability and strength. Any financial statement required by Wisconsin or any other State would need reflect all assets and liabilities of the company in the

interests of truth. Their inclusion does not mean that out-of-state activities are being regulated by Wisconsin. It only means that solvency of a multi-state business can hardly be determined on a single state basis. Accounting is no exact science. The due process clause certainly does not require uniformity in requirements for financial statements of companies doing a multi-state business. Each State must necessarily have leeway in providing its own accounting standards for companies doing business within its borders. If a state undertook to regulate out-of-state activities through such a requirement, different questions would be posed. But we fail to see that Wisconsin has done that here. We cannot say that the reserve required by Wisconsin has any purpose but the protection of its own citizens. Its adequacy or appropriateness as a standard for qualification to do business in Wisconsin is therefore a question for Wisconsin to determine.

II. Little need be said in reply to the contention that the Wisconsin statute as construed and applied violates the full faith and credit provision of the Constitution. Appellant's argument comes down to this: Illinois, the state of incorporation, does not treat the membership fees as a part of the premiums. Therefore, Wisconsin may not do so. The result would be that no State could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation. The full faith and credit provision requires no such result. This Court has recognized that "In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states" is imperative. *Alaska Packers Assn* v. *Industrial Accident Commission*, 294 U. S. 532, 547. The full faith and credit provision may not be used to compel one State "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 501. He who challenges the power of one State to enforce in its own courts its own statutes on such grounds carries the burden of showing that "of the conflicting interests involved those of the foreign state are superior to those of the forum." *Alaska Packers Assn* v. *Industrial Accident Commission*, *supra*, p. 548. That burden has

not been carried here. Wisconsin obviously has a considerable interest in the financial soundness and stability of foreign as well as domestic companies doing business in Wisconsin. It is not apparent how Illinois has a superior interest. As among the several States it is Wisconsin's prerogative to select the appropriate means of protecting its own citizens by establishing financial standards for companies which exploit the opportunities which Wisconsin affords.

III. Appellant's remaining contention is that this Wisconsin statute as construed and applied violates the Commerce Clause of the Constitution. Art. I, Sec. 8. This question was not raised below. It emerged after the jurisdictional statement was filed here on June 1, 1944. For on June 5, 1944, we decided *United States* v. *South-Eastern Underwriters Assoc.*, 322 U. S. 533, holding that the fire insurance business was commerce within the meaning of the Commerce Clause and the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 and § 2. Since the Wisconsin Supreme Court did not pass on the question, we may not do so. *McGoldrick* v. *Compagnie Generale Transtlantique*, 309 U. S. 430, 434. But our decision in the *South-Eastern Underwriters* case was a supervening event arising in the course of this litigation. We do not think appellant should be prejudiced by the fact that the decision came too late for it to obtain a ruling by the Wisconsin court. The question is what disposition we should make of this appeal so that in the interests of justice appellant may have a hearing on the commerce point.

A customary procedure has been for the Court to vacate the judgment of the state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances. *Gulf, Colorado & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503; *Missouri* v. *Public Service Commission*, 273 U. S. 126; *Pagel* v. *MacLean*, 283 U. S. 266; *Patterson* v. *Alabama*, 294 U. S. 600, 607; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156. See *Dorchy* v. *Kansas*, 264 U. S. 286, 291. In those cases the supervening event had raised questions of state law which might have warranted a reversal of the judgment. If they were adequate, it would be unnecessary to reach the federal questions which were presented. Moreover, it appeared in some of those cases that unless the judgment of the state court were vacated, the opportunity to

raise the new questions which had emerged might be lost. See *Gulf, Colorado & S. F. Ry. Co.* v. *Dennis, supra; Pagel* v. *MacLean, supra.* It is suggested that the course should be followed here so that this additional federal question may be passed upon by the Wisconsin Supreme Court. We would not hesitate to adopt that procedure in the interests of justice if it appeared that otherwise appellant would be foreclosed from an adjudication of the issue. Appellant does not show that it would be. Respondent assumes in its brief that appellant will not be foreclosed. And we think that assumption is warranted for the following reasons.

We are advised that appellant has pending in the Wisconsin courts another suit in respect to the license year commencing May 1, 1944. Wisconsin has the familiar rule that though the validity of the law in question might have been determined in an earlier suit, the prior judgment is not *res judicata* where the second suit is on a different cause of action in absence of evidence to show that the question was actually presented to the court and decided in the earlier litigation. *Wentworth* v. *Racine County*, 99 Wis. 26, 31; *Grunert* v. *Spalding*, 104 Wis. 193, 213-214; *Lindemann* v. *Rusk*, 125 Wis. 210, 237. But if that principle is inapplicable here it is nevertheless the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation. 2 Freeman on Judgments (5th ed. 1925) § 713; *Blair* v. *Commissioner*, 300 U. S. 5, 9; *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 654, 662; *In re Pomeroy*, 51 Mont. 119; *Hurd* v. *Albert*, 214 Calif. 15, 26. We cannot find that Wisconsin has a different rule.

The Wisconsin statute, moreover, gives the court power to allow an amendment "at any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just" provided that "the amended pleading states a cause of action arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based." Wis. Stat. 1943, § 269.44. That power has been construed very liberally. *Kennedy* v. *Waugh*, 23 Wis. 468; *Post* v. *Campbell*, 110 Wis. 378; *Mallon* v. *Tonn*, 163 Wis. 366; *Micek* v. *Wamka*, 165 Wis. 97; *Turner Mfg. Co.* v. *Gmeinder*, 183 Wis. 664; *Kaegi* v. *Industrial Commission*, 232 Wis. 16. And it exists after the case has been remanded to the trial court following an affirmance by the Wis-

consin Supreme Court. See *Angers* v. *Sabatinelli*, 235 Wis. 422; *id.*, 239 Wis. 364.

We conclude that appellant is not foreclosed under Wisconsin procedure from obtaining a determination in the Wisconsin courts of the commerce clause question either in the present suits or in the other pending one. Accordingly we do not think it is necessary to vacate the judgment below in order that appellant may have an opportunity to obtain the ruling.

Affirmed.

Mr. Justice ROBERTS dissents.

Mr. Justice JACKSON.

I think that the judgment below should be vacated rather than affirmed and do not, therefore, reach the constitutional questions dealt with in the Court's opinion. I doubt that the Wisconsin Supreme Court can open and re-examine a judgment after it is affirmed by this Court. As the Court recognizes, to vacate is the procedure that has been followed when similar situations have been presented heretofore.